No. 14698

In the United States Court of Appeals

For the Ninth Circuit

G. V. FEELEY, AS ADMINISTRATOR OF THE ESTATE OF GEORGE A. FEELEY, DECEASED,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellee.

Brief of G. V. Feeley, Administrator as ~~Appellee~~ Appellant

WILLIAM G. MOUAT
Billings, Montana;
LEE OVERFELT
Billings, Montana
Attorneys for Appellant.

COLEMAN, JAMESON & LAMEY;
CALE CROWLEY;
BRUCE R. TOOLE,
Attorneys for Appellee.

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Billings, Montana;
LEE OVERFELT
Billings, Montana
Attorneys for Appellant.

COLEMAN,
JAMESON & LAMEY;
CALE CROWLEY;
BRUCE R. TOOLE,
Attorneys for Appellee.

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Appellee.

Upon Appeal from the United States District Court for the District of Montana

The Brief of G. V. Feeley as Administrator of the Estate of George A. Feeley, Deceased

JURISDICTION

This is an appeal from final judgments entered on the 20th day of December, 1954 in causes no. 1468 and 1469, which were consolidated for trial and heard by

the above entitled court as companion cases. On the 17th day of January, 1955, G. F. Feeley as administrator of the estate of George A. Feeley, deceased, filed notices of appeal (tr.379). Jurisdiction of the District Court rests upon 28 U. S. C., Section 1332. The jurisdiction of this court is under 28 U. S. C. Section 1291. The court is hereby referred to the transcript at pages 1, 2, 3, 7, 9 and 11 for the pleadings verifying the existence of the jurisdiction of the United States District Court for the District of Montana, Billings Division. These actions were instituted by G. V. Feeley, a citizen of the State of Montana, as administrator of the estate of George A. Feeley, deceased, against the Northern Pacific Railway Company, a Wisconsin corporation. Cause No. 1468 was brought for the sum of $48,000 plus costs. Cause No. 1469 was brought for the sum of $30,160 plus costs. The total amount sought in both actions, $78,160.

QUESTIONS PRESENTED

Whether or not instructions on primary negligence, contributory negligence and the helpless peril theory of last clear chance can properly be submitted where plaintiff's pleadings set out a case of last clear chance based on negligent inattention and nothing more, is the basic question in this case. Further, since instructions under the theory of primary negligence, contributory negligence and helpless peril are in direct conflict with instructions on the "negligent inattention" theory of last clear chance, were these instructions, since they were in direct conflict

on a material issue, so misleading and confusing that they could have caused the jury to reach the wrong verdict and thereby prejudiced the plaintiff to such an extent that he is entitled to a new trial?

STATEMENT

The complaints in this matter were identical in all respects except as to the relief sought. For this reason, the two cases were consolidated for trial. The theory of negligence presented in both complaints was based on the fact that although the intestate was negligent, that after his negligence and inattention was discovered, the defendants failed to use their last clear chance to avoid injuring him. In the pleadings filed by the defendant the theory of contributory negligence was pleaded even though negligence was already alleged and admitted in plaintiff's complaint. Plaintiff's case was presented on the theory of "discovered inattention" and instructions fitting plaintiff's case were properly granted, they being instructions number 3, 8, 11, 12, 13 and 14 (tr. 352, and 355 thru 358) (also see specifications of error.) However, at the same time defendant's special requests numbered 17, 21, 22, 23, 24, 25 and 26 (tr. 343 thru 349) (see also specifications of error), were also granted. These instructions were based on the "helpless peril" theory of last clear chance, primary negligence and contributory negligence. We contend that those instructions were improperly given since they were based on matters not at issue in the case and because they were in direct conflict with instructions properly submitted on behalf

of the plaintiff, and therefore confused and mislead the jury.

SPECIFICATIONS OF ERROR

1. The Court erred in granting Defendant's Special Request No. 17 (tr. 343) for the reasons set out in the objection herein, and because the said instruction is based on the theory of helpless peril rather than mental inattentiveness and therefore confused and mislead the jury. The instruction is as follows:

"You are instructed that to make the doctrine of last clear chance applicable, three elements are indispensable, namely:

1. that George A. Feeley was in a position of peril brought about by his own negligence;

2. the actual discovery by the defendant of the perilous situation of George A. Feeley in time thereafter to avert the injuries complained of, if any; and

3. the failure of the defendant thereafter to use ordinary care to avert the said injuries.

All of these elements must concur, otherwise the doctrine has no application, and if you find from a preponderance of the evidence that any one or more of such elements is lacking, the plaintiffs cannot recover under the doctrine of last clear chance.

George A. Feeley was in a zone of safety at all times while approaching said crossing until he arrived at a point on the road after which he could not, in the exercise of reasonable care, stop before entering upon the tracks. He was in a position of

peril after he arrived at a point on the road from which he could not thereafter, in the exercise of reasonable care, stop his truck before entering upon the tracks."

OBJECTION (tr. 361)

1. Plaintiff objects to the granting of Defendant's special request No. 17 for the reason that this instruction is misleading. This is an instruction for the helpless peril type of last clear chance, and is not applicable in its entirety to the negligent inattention theory of last clear chance.

2. The District Court erred in granting defendant's Special Request No. 19 (tr. 344 and 345) for the reason set out in the objection herein and because the instruction was incomplete and failed to consider the possibility that the tragedy could have been avoided by ringing the bell or slowing the train, the instruction therefore mislead and confused the jury.

The instruction is stated as follows:

"You are instructed that unless plaintiffs prove by a preponderance of the evidence that the trainmen in charge of the train failed to use ordinary care to avert the injuries complainted of, if any, after they actually discovered that George A. Feeley had entered into a position of peril, plaintiffs cannot recover; and if you find from the evidence that after the trainmen in charge of the train discovered that George A. Feeley had entered into a position of peril, the train could not thereafter have been

stopped by the exercise of ordinary care, in time to have averted the accident, your verdicts must be for the defendant."

OBJECTION: (tr. 361)

Plaintiff objects to the granting of Defendant's special request No. 19 for the reason this is an incorrect statement of the law: it is misleading. That fact that the train was equipped with whistle and bell should also be considered in addition to the fact that the train had brakes, whistle, and bell and signals under the control of the fireman and engineer, also under the facts it would not have been necessary to stop the train; mere slowing of the train may have saved the life of George A. Feeley.

3. The District Court erred in granting Defendants Special Request No. 20 (tr. 345) for the reason stated in the objection herein contained, said instruction being as follows:

"If you find from a preponderance of the evidence that after the actual discovery of George A. Feeley in a position of peril, if you find he was in a position of peril, the engineer in charge of said train exercised reasonable care to avert the collision with George A. Feeley, your verdicts must be for the defendant."

OBJECTION (tr. 362)

Plaintiff objects to the granting of Defendant's special request No. 20 for the reason that the instruction is misleading; there is no mention in the instructions of the fireman or the conductor who were in a position to have averted the accident, the collision; it is an incorrect state-

ment of the law, the applicable law being what would a reasonably prudent man under the same circumstances have done. The instruction uses the words "position of peril" which is not applicable in the case of inattentive motorist, an inattentive motorist is in a situation of danger rather than a position of peril.

4. The Court erred in granting defendant's special request No. 21 (tr. 345) for the reasons set out in the objection herein and because the said instruction is based on the theory of negligence and contributory negligence and is in direct conflict with plaintiff's instructions 3, 8, 11, 12, 13, and 14, and is therefore confusing and misleading; instruction 21 is as follows:

> "You are instructed that if George A. Feeley failed to exercise due care for his own safety; that is, such care as a reasonably prudent person would exercise for his own safety under similar circumstances; then George A. Feeley was guilty of contributory negligence; and if you find from a preponderance of the evidence in this case that George A. Feeley was guilty of any negligence alleged in defendant's answer or shown by the testimony contemporaneous, concurrent, continuous, and contributory with negligence of the defendant up to and producing the accident complained of, then the plaintiffs cannot recover in these actions, and your verdicts must be for the defendant, regardless of whether or not you find that the defendant itself was guilty of negligence."

OBJECTION (tr. 362)

Plaintiff objects to the granting of Defendant's special request No. 21 on the ground it is prejudicial and is an incorrect statement of the law and does not apply to an inattentive motorist and applies only to the condition of helpless peril. The standard to be used instead of the application of the doctrine of primary negligence or contributory negligence is the rule of what an ordinary prudent man would have done or might have done under the same circumstances. Contributory negligence is inapplicable in this case, the plaintiff having admitted that the decedent was contributorily negligent, and we are concerned only with the negligent inattentive theory of the last clear chance.

5. The court erred in granting defendant's special instruction number 22 (tr. 346) for the reasons set out in the objection herein and because the instruction is based on primary and contributory negligence and is therefore in direct conflict with plaintiff's instructions 3, 8, 11, 12, and 14, therefore misleading the jury. Instruction 22 is as follows:

"You are instructed that if you find from the evidence that if George A. Feeley, had he looked and listened, ought to have heard the warnings and signals of the train, if any were given, and that if he had exercised reasonable care he would have heard said warnings and signals, if any were given, and would have seen the locomotive and heard the noise created by the rapidly moving train, in time to avoid

the accident, then and in that event your verdicts should be for the defendant.

OBJECTION (tr. 363)

Plaintiff objects to the granting of Defendant's Special Request no. 22 for the same reasons given in their objection to special request no. 21; the instruction, as is true with defendant's special request No. 21, is misleading and is an incorrect statement of the law of the case as shown in the Union Pacific case supra.

6. The court erred in grasting defendant's special request No. 23 (tr. 346) for the reasons set out in the objections herein and because the instruction deals with primary negligence and is in complete conflict with plaintiff's instructions 3, 8, 11, 12, 13, and 14; therefore, it is confusing and misleading to the jury. Instruction 23 is as follows:

"You are instructed that all persons driving motor vehicles upon the public highways of this state, outside of corporate limits of incorporated cities or towns, where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten nor more than one hundred feet from where said highway intersects railroad tracks within this state before crossing the same, and if you find from a preponderance of the evidence that said train was moving within sight or hearing of George A. Feeley and you further find that George A. Feeley failed to bring his truck to a full stop not less than ten nor more than one hun-

dred feet from where said highway intersects said railroad tracks, and you further find from a preponderance of the evidence that George A. Feeley's failure to stop his truck proximately contributed to the injuries and death sustained by him, he is guilty of contributory negligence, and plaintiffs cannot recover and your verdicts must be for the defendant."

OBJECTION (tr. 363)

Plaintiff objects to the granting of Defendant's Special Request No. 23 for the reason it is an incorrect statement of the law of the case; this instruction applies only to primary negligence; it is confusing and misleading to the jury; the plaintiffs have admitted that the decedent was contributorily negligent and for that reason it is confusing to the jury and not applicable, and misleading to the jury.

7. The Court erred in granting Defendant's Special Request No. 24 (tr. 347) for the reasons set out in the objections herein and because the instruction deals with a primary negligence situation and therefore is confusing and misleading in a case of last clear chance. Instruction 24 is as follows:

"You are instructed that the presence of a railroad track is of itself a warning of danger; a person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual obervation that there is no danger from an approaching train;

The failure to the persons in charge of the train to keep a lookout or to give warning signals of its approach to the crossing does not relieve the traveler of the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed onto said crossing;

The traveler must use ordinary care to make his looking and listening reasonably effective, and whenever there is a zone of safety within which a traveler upon a highway may, by looking and listening, and stopping, if need be to ascertain the presence of an oncoming train, it is his duty to make his observation within such zone;

If he proceeds from a place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made a vigilant use of his senses to discover a danger which is present and could have been seen from such place, then it will be held to be his negligence which is the proximate cause of the injury resulting from a collision, regardless of circumstances tending to show negligence on the part of the railroad operators.

When a train is at a point which is within the traveler's vision while he is in a place of safety, he will be deemed either to have seen it and proceeded regardless of the danger, or to have failed to make a vigilant use of his senses.

Therefore, if you find from a preponderance of the evidence in this case that, when George A. Feeley

was in a place of safety, the train was at a point on said track within George A. Feeley's vision and having seen the approaching train or having failed to make a vigilant use of his senses to discover the same, he entered the crossing in front of the approaching train when it was too late for the engineer in charge of said train, by the exercise of reasonable care, to avert a collision between the train and the truck which George A. Feeley was driving, plaintiffs cannot recover and your verdicts must be for the defendant."

OBJECTION: (tr. 363)

Plaintiff objects to the granting of Defendant's Special Request No. 24 for the reason that the instruction assumes a set of facts not in evidence, it, therefore, also misleading. The instruction is inapplicable to the inattentive motorist type of last clear chance case. This instruction is an instruction to be given and which can properly be given only in a case of primary negligence situation.

8. The Court erred in the granting of Defendant's Special Request No. 25 (tr. 349) for the reasons set out in the objection herein and because the special request is an instruction on primary negligence in direct conflict with plaintiff's special requests numbered 3, 8, 11, 12, 13, and 14 and is therefore confusing and misleading, Special Request 25 being as follows:

"It was the duty of George A. Feeley to exercise due care for his own safety; that is, to look and listen and otherwise make use of his natural facilities

to discover and avoid the danger that threatened him from defendant's train that was approaching the crossing, and a special duty of care rested upon him in approaching a crossing with the presence and location of which he was thoroughly familiar.

You are further instructed that if a view of the track was obscured, or factors made the sound of an approaching train inaudible, George A. Feeley was required to take such precautions as would render sight or hearing effective, and, if necessary, to make his looking and listening reasonably effective, he was required to stop at such point as would accomplish that purpose."

OBJECTION (tr. 364)

Plaintiff objects to the granting of Defendant's Special Request No. 26 for the reason that it is an incorrect statement of the law as applied to the present case; the engineer and trainmen must act as reasonably prudent men when they have discovered an inattentive motorist; the instruction takes into consideration only the ordinary negligence, that is primary negligence type of case, and does not contemplate an action brought under last clear chance and particularly in a situation of negligent inattention.

9. The Court erred in granting defendant's special requests sumbered 17, 19, 20, 21, 22, 23, 24, 25, and 26 heretofore stated in specifications of error numbered 1 thru 8 because the said instructions were in direct conflict with plaintiff's special requests No. 3, (tr. 353), No. 9,

(tr. 354), No. 11, tr. (355), No. 12, (tr. 356), No. 13, (tr. 356), and No. 14, (tr. 357), defendant's said instructions being irreconciliable and having the effect of misleading and confusing the jury. Plaintiff's special requests numbered 3, 9, 11, 12, 13, and 14 are as follows: (tr. 353, 354, 355, 356, 357).

1. Plaintiff's offered instruction No. 3:

"You are instructed that the continued movement of the decedent toward the railroad crossing, a place of danger, after a warning sound is notice that he was unaware of his peril, and is enough to break the reciprocal balance of duty, and, if it can be said that he had the time to do so, puts upon the defendant the positive duty of avoiding the accident."

2. Plaintiff's offered instruction No. 9:

"If you find from a preponderance of the evidence that the fireman or conductor or any member of the train crew, at the time mentioned, was in a position where he or they could have seen plaintiff's Jeep station wagon approaching the crossing and could have seen that Mr. G. A. Feeley was inattentive and unaware of the approach of the oncoming train, these are circumstances which you may take into consideration in determining whether or not the servants of the defendant saw the said G. A. Feeley in time to have averted the injuries complained of by the plaintiff.

The law presumes that a person looking down the track in the position of the fireman and conductor,

if you find they were looking down the track, should have seen what was in plain sight to be seen."

3. Plaintiff's offered instruction No. 11:

"Even if G. A. Feeley, the deceased, by the exercise of reasonable vigilance would have observed the danger created by the defendant's negligence, if you find that defendant was negligent, in time to have avoided harm therefrom, plaintiff may recover if the defendants knew of Mr. Feeley's situation and realized or had reason to realize that Mr. Feeley was inattentive, and therefore unlikely to discover his peril in time to avoid the harm and if defendant's servants were thereafter negligent in failing to utilize with reasonable care and competence their then existing ability to avoid harming Mr. Feeley.

In this respect, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case.

Even such a chance that Mr. Feeley might not have discovered his peril would have been enough to require the trainmen to make a reasonable effort to avoid injuring him.

Therefore, if you find that there was anything in the demeanor or conduct of Mr. Feeley which to a reasonable man in the position of defendant's agents would indicate that Mr. Feeley was inattentive, and, therefore, would not or might not have discovered

the approach of the train, defendant's servants and employees are obliged to take such steps as reasonable men would think necessary under the circumstances, and if you find that they or any of them did not do this, you must find for the plaintiff."

4. Plaintiff's offered instruction No. 12:

"The court further instructs the jury that the duty of a railway company, and its operators and agents in control to control the locomotive at crossings such as the crossing at which Mr. Feeley was killed, in order to avoid collision, does not arise solely when a person is on the track, but also obtains if his danger was apparent while he was approaching the track."

5. Plaintiff's offered instruction No. 13:

"Even if you find there is no direct evidence that G. A. Feeley was actually discovered by the engineer, fireman or conductor in time to avoid the collision, this fact may still be established by circumstantial evidence.

If the circumstances indicate to you that Mr. Feeley was unaware of his danger, and that this unawareness was discovered by the engineer, fireman or conductor in time to avoid the collision or injury to Mr. Feeley, then you must find in favor of the plaintiff."

6. Plaintiff's offered instruction No. 14:

"You are instructed that if any railroad corporation within this state shall fail to have upon any locomotive in use by it in this state a bell and whistle

in fit condition for use thereon, or shall permit any locomotive to approach any railroad crossing, without causing the whistle to be sounded at a point between fifty and eighty rods from the crossing, and the bell rung from said point until the crossing is reached, it is negligent per se.

However, even if these signals might have been given as the defendant's train approached the Feeley crossing, if the engineer, conductor or fireman observed that they were not heard by Mr. Feeley, or that the train was not discovered by him in time to avoid the collision, you are instructed that it was their duty to give such additional signals as an ordinarily prudent man would deem necessary; and if you find that Mr. Feeley was unaware of the approaching train and that such additional signals were not given, and that had they been given, Mr. Feeley's death could or would have been avoided, then you must return your verdict in favor of the plaintiff."

ARGUMENT

At the outset, it appears to be a basic proposition that instructions as a whole must be consistent and harmonious and not conflicting and contradictory. 53 Am. Jur., pages 442 and 443, contain the following statement in that regard:

> "Where instructions give to the jury for their guidance contradictory and conflicting rules which are unexplained, and where following one would or might lead to a different result than would obtain by following the other, the instructions are inherently

defective. This is true although one of the instructions correctly states the law as applicable to the facts of the case, since the correct instruction cannot cure the error in the contradictory erroneous instruction. Inconsistent instructions are calculated to mislead and confuse the jury, since the jury are thereby left in doubt and without any certain guide as to the law arising upon the evidence."

It is also a well settled principle that the instructions given by the trial court should be confined to the issues raised by the pleadings. In this regard the following statemest from 53 Am. Jur. 453 may be appropriate:

"The particular matters to be covered in the instructions depend upon the issues joined by the pleadings and supported by the evidence . . . indeed it is error to submit to the jury as a basis of recovery an issue not raised by, or a theory of the case finding no basis in plaintiff's pleadings, a case of action substantially different from that alleged, or questions of damages not recoverable under the pleadings."

Authority indicating that Montana is substantially in accord with these propositions is found in the following cases which seem to hold unanimously that the giving of conflicting instructions on a material issue is a reversible error.

Kelton v. Great Northern Ry. Co. 100 P. 2d 929.

Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1 88 P. 401.

Wells v. Waddell, 59 Mont. 436, 196 P. 1000.

It is our contention that the case at bar was based on one theory and one theory only, that being "The Discovered Inattention Theory of Last Clear Chance" and the introduction of any other theory into this case especially

when by its terms it is contradictory to the theory of last clear chance as set out in the complaint, is not only erroneous, but since it confuses the jury it amounts to reversible error. Plaintiff's complaint (tr. 1 thru 7 and tr. 9 thru 11) should most clearly reveal that no other theory than that heretofore stated could have ever possibly been considered in presenting this case. See also transcript at pages 4 and 5, wherein it is stated in effect that the decedent's inattention was discovered, but no effort was made by the defendant's employees to avoid injuring him. No other issue was raised; no defense based on any other theory was appropriate.

By way of illustration, we believe that the Last Clear Chance Doctrine as a whole permits recovery when the following situations are present, assuming of course at the outset, that the plaintiff was negligent:

(1) When there is discovered helpless peril (i.e., physical helplessness) of the injured person regardless of the place of injury.

(2) The undiscovered helpless peril (i.e. physical helplessness) of the injured person at the place where defendant is under a duty to keep a lookout as at railroad crossings.

(3) The discovered negligent inattention (i.e. mental obliviousness) of the injured person regardless of the place of injury.

(See 1944 Montana Law Review Spring Issue, page 12 and 13 and the Restatement of Torts, pages 479-480.)

See also:

Doichinoff v. Chicago M & St. P. Ry. Co. et al.
51 Mont. 582, 154 Pac. 924.

to the effect that Montana permits recovery under the negligent inattention theory of last chance, i.e., a situation where a negligent plaintiff's inattention is apparent, but wherein no subsequent steps were taken to avoid injurying him after discovery of the plaintiff's peril, due to his inattention as set forth in theory No. 3, heretofore cited.

We resorted to the third theory of last clear chance heretofore cited and pursuant to the Montana authority heretofore cited in order to establish our case. And since there was no other theory to consider, we believe that no instructions should have been submitted on any other theory of last clear chance or primary or contributory negligence.

However, even though we proceeded under the theory of discovered inattention, defendant's special request No. 17 was granted containing instructions for the "helpless peril theory of last clear chance."

Under that theory it is apparent that recovery is possible only if one is discovered in a situation of physical helplessness and nothing is subsequently done to prevent his injury. This requires that the plaintiff must have been physically helpless, an allegation which was not a part of the complaint in our case (had such a situation been in existence, we would have alleged it and attempted to recover under it). However, the situation alleged in plaintiff's case was discovered mental inattentiveness, a

factual situation requiring that the mental inattentiveness be apparent to the defendant or to a reasonably prudent person. It of course becomes immediately apparent that the two situations are not to be reconciled. To require that the plaintiff be in a situation of physical helplessness to recover in a cause of action where the crux of the liability is based on apparent mental inattentiveness that may very likely place the defendant in a position of danger, is to place two entirely different factual situations before the jury for their consideration which are in direct opposition to each other. One requires physical helplessness for recovery and the other requires mental inattentiveness, the latter only being the subject of the complaints in the case at bar. However, the really serious objections pertain to defendant's special requests numbered 21, 22, 23, 24, 25 and 26, they being instructions pertaining to contributory negligence and primary negligence.

It is alleged and admitted that plaintiff was negligent, and the only real question is whether or not the defendant had the last clear chance to avoid injuring the plaintiff. Defendant's Instructions numbered 21, 22, 23, 24, 25, and 26, however, require that in order that plaintiff recover, he should not have been negligent at any time. This is obviously misleading in a case where all negligence on the part of the plaintiff is already admitted and the only question to be considered is, that notwithstanding the plaintiff's negligence and inattentiveness, did the defendant have the last clear chance to avoid injuring the plaintiff? Instructions on primary negligence improperly

submitted have been censured in other cases.

Francis v. Missouri Pac. Railroad Co. 85 S. W. 2d 915.

Defendant's special request numbered 21, pertaining to contributory negligence cannot be reconciled with any instruction on last clear chance and is clearly prejudicial. In the case of Mihelich v. Butte Electric Ry. Co. et al., a Montana case cited at 281 Pac. 540, the court states without qualification as follows:

> *"A plea of contributory negligence is not a defense if the action is brought upon the theory that, notwithstanding such negligence the defendant had the last opportunity to avoid the injury and failed to exercise it. The rule of pleading in cases which do not invoke the doctrine of the last clear chance does not have any application . . . in a case, which depends entirely upon that doctrine."* (Emphasis ours.)

It would appear therefore, that the Montana courts agree that the theory of contributory negligence has no application in a last clear chance case where no other issue has been raised. More definite statements indicating that instructions on contributory negligence in last clear chance cases and in cases involving the humanitarian doctrine constitute error are found in the case of Louisville & Nashville Railroad Company Appt. vs. L. F. Johnson Admr. etc. of Reuben Harrod, Deceased, where the court states as follows:

> The familiar rule is that, though the plaintiff may have been negligent, still his negligence does not bar a recovery if, after his peril has been discovered, the defendant with knowledge of his danger fails to use ordinary care for his protection . . . we therefore con-

clude that the instruction given on contributory negligence should not have been given.

155 Ky. 155, 159 S. W. 685 47 L. R. A. (N.S.) 918.

A similar rule was stated in the case of Frances vs. Missouri Pac. Transp. Co. Mo. App., (85 S. W. 2d 915), which held in effect that defendant in a negligence case has a right to have his theory submitted by instruction, but where a requested instruction includes primary negligence, which is improper in a case submitted solely on the humanitarian doctrine, the giving of such an instruction injects foreign and prejudicial issues and is properly refused.

The Missouri cases cited hereinafter are directly in point and offer an irrebuttable argument against permitting contributory and primary negligence instructions in cases submitted solely on the basis of last clear chance and the humanitarian doctrine.

While it is not contended that Montana has extended the Last Clear Chance Doctrine to include the Humanitarian Doctrine, the same considerations do apply to both doctrines in that in both doctrines the negligence is admitted and the cases turn on a failure to then take subsequent steps to avoid the injury in question. From the Montana case of Mihelich vs. Butte Electric Ry. Co. heretofore cited, it is apparent that the courts of Montana hold that where the issue is only last clear chance and nothing else, the doctrine of contributory negligence does not apply. A similar result is reached in the Missouri Cases dealing with this problem where it applies to the humanitarian doctrine.

McCall v. Thompson 155 S. W. 2d, 161, 348 Mo. 795.

White v. Kansas City Public Service Co. 149 S. W. 2d 375, 347 Mo. 895.

Dilallo v. Lynch 101 S. W. 2d 7 340 Mo. 82.

Willhauck v. Chicago R. I. & P. Ry. Co., 61 S. W. 2d 336, 332 Mo. 1165.

Silliman v. Munger Laundry Co., 44 S. W. 2d 159, 329 Mo. 235.

Schulz v. Smercina 1 S.W. 2d 113, 318 Mo. 486.

Those cases are unanimous in holding that where a case is properly submitted on the humanitarian doctrine, the question of contributory negligence is eliminated and that to submit it under such circumstances is error.

The only exception to this rule is where the case is not submitted solely on the humanitarian doctrine.

Wholf v. Kansas City C. C. & St. J. Ry. Co. 73 S. W. 2d, 195, 335 Mo. 520.

A study of these cases and particularly the reasoning therein establishes without question, the basis of the argument in this brief. This is, in substance, that in a case such as the instant case, where the only issue raised in the plaintiff's case is last clear chance, instructions on contributory negligence are unnecessary because the question of contributory negligence is not at issue, and since primary negligence instructions and contributory negligence instructions by their very nature are completely contradictory to last clear chance instructions, submitting them in a case based solely on last clear chance is erroneous and prejudicial and amounts to reversible error.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully submitted,

LEE OVERFELT,
Billings, Montana
WILLIAM G. MOUAT
Billings, Montana
Attorneys for Appellant,
G. V. Feeley, Administrator of the Estate of
George A. Feeley, Deceased.